

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID JAMES CLARK,

Defendant.

No. CR-13-0097-FVS

ORDER GRANTING MOTION IN
LIMINE AND DENYING MOTION
TO DISMISS

THIS MATTER came before the Court on August 5, 2013. Assistant United States Attorney George J.C. Jacobs, III, appeared on behalf of the United States. Defendant was present and represented by Robert B. Fischer. This order is intended to memorialize and supplement the Court's oral rulings.

I. BACKGROUND

On October 21, 1997, Defendant was convicted of felony sexual assault in the Circuit Court of Jasper County, Missouri, and sentenced to five years in prison. On March 30, 2011, Defendant completed a Missouri Sex Offender Registration and provided an address in Webb City, Missouri. He was advised that: "Under the Adam Walsh Child Protection Act of 2005, 18 United States Code 2250, if you travel to another state and fail to register as required, you are subject to federal prosecution"

1 Social Security Administration records indicate Defendant
2 reported on August 16, 2012, that his address as of May 1, 2012, was
3 1425 Matson Road, Colville, Washington. On June 6, 2013, Defendant
4 was charged in the Eastern District of Washington with failing to
5 register as a sex offender in violation of 18 U.S.C. § 2250(a). The
6 indictment alleges as follows:

7 Between on or about June 30, 2011, and June 6, 2013 in the
8 Eastern District of Washington, DAVID JAMES CLARK, a person
9 required to register under the Sex Offender Registration and
10 Notification Act, traveled in interstate commerce and did
11 knowingly fail to register and update a registration, all in
12 violation of 18 U.S.C. § 2250(a).

13 (ECF No. 17).

14 **II. DISCUSSION**

15 **A. Motion in Limine**

16 On July 19, 2013, Defendant filed a motion in limine raising
17 five specific issues. (ECF No. 27). The Government filed a response
18 on July 26, 2013. (ECF No. 28).

19 **1. Old Chief Stipulation**

20 Defendant requests that the Court provide the jury with an Old
21 Chief stipulation for the predicate felony conviction (Defendant's
22 1997 sex offense conviction) pursuant to 18 U.S.C. § 2250(a) and 42
23 U.S.C. § 16911, et seq. (ECF No. 27 at 3-4). The Government's
24 response indicates it is in agreement with Defendant and believes the
25 parties can agree upon a stipulation to avoid the necessity of
26 disclosing to the jury the nature of Defendant's prior sex offense.
(ECF No. 28).

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1 **2. Rule 404(b)/609 Evidence**

2 Defendant requests that the Court compel the Government to
3 identify which prior convictions of Defendant it seeks to introduce
4 under Rules 404(b) and 609. (ECF No. 27 at 5-6). The Government
5 responded it will, by separate response, provide notice of its intent
6 to use Rule 404(b)/609 evidence. (ECF No. 28).

7 **3. Exclusion of Witnesses**

8 Defendant requests, pursuant to Fed.R.Evid. 615, that all
9 witnesses be excluded from the courtroom until they are excused from
10 service. (ECF No. 27 at 6). The Government responded it joins in
11 the defense motion to exclude witnesses. (ECF No. 28).

12 **4. Overview Testimony**

13 Defendant requests that the Court prohibit any vouching or
14 "overview testimony" by any law enforcement agent or officer. (ECF
15 No. 27 at 6-8). The Government indicated it will seek to admit only
16 admissible evidence. (ECF No. 28).

17 **5. Percipient Witnesses as Expert Witnesses**

18 Defendant requests that the Court determine the admissibility of
19 any percipient witnesses as expert witnesses prior to its admission
20 to the jury. (ECF No. 27 at 8-12). The Government indicated it is
21 in agreement that any opinion evidence should be addressed outside
22 the presence of the jury. (ECF No. 28).

23 Based on the Government's July 26, 2013 response (ECF No. 28),
24 it is apparent there is no disagreement with respect to the issues
25 raised by Defendant's motion in limine. Accordingly, the Court
26 grants Defendant's motion in limine.

1 **B. Motion to Dismiss**

2 Defendant has additionally filed a Motion to Dismiss the
3 Indictment. (ECF No. 26). Defendant challenges the application of
4 the Sex Offender Registration and Notification Act ("SORNA").

5 SORNA was passed on July 27, 2006. It creates national
6 standards for sex offender registration and a national sex offender
7 registry. In addition, it criminalizes a sex offender's failure to
8 register. States are encouraged to implement SORNA through funding
9 incentives. The state of Washington has yet to implement SORNA.

10 **1. Application of SORNA**

11 Defendant first asserts that the indictment must be dismissed
12 because the applicable statute requires a defendant to register with
13 a SORNA compliant sex-registration scheme and, at the time of
14 Defendant's alleged offense, no such SORNA-compliant scheme existed
15 in the state of Washington. Defendant contends that until a state
16 implements SORNA, it is impossible for an offender to register under
17 SORNA, and, because Washington State has yet to implement SORNA,
18 Defendant is not obliged to register under SORNA.

19 The arm of SORNA which imposes criminal sanctions requires sex
20 offenders to "register under the Sex Offender Registration and
21 Notification Act." 18 U.S.C. § 2250. Pursuant to SORNA, the "sex
22 offender shall register, and keep the registration current, in each
23 jurisdiction where the offender resides, where the offender is an
24 employee, and where the offender is a student." 42 U.S.C. §
25 16913(a). Accordingly, the plain language of Section 16913(a)
26 commands a sex offender to register in each jurisdiction where the

1 offender resides, is employed, or goes to school. (ECF No. 29 at 5).
2 It does not command a sex offender to register in each jurisdiction
3 or residence, employment or school only after those jurisdictions
4 have implemented SORNA.

5 There is an abundance of case law which has held that the
6 failure of the state to implement or update its registration in
7 accordance with SORNA does not relieve the sex offender of his duty
8 to register all information that is required by then existing state
9 law. *See, e.g., United States v. George*, 625 F.3d 1124, vacated on
10 other grounds, 672 F.3d 1126 (9th Cir. 2010) ("Without regard to
11 whether SORNA is implemented by Washington or any other state,
12 registration under it is required."); *United States v. Guzman*, 591
13 F.3d 83, 93 (2nd Cir. 2010) ("SORNA creates a federal duty to
14 register with the relevant existing state registries regardless of
15 state implementation of the specific additional requirements of
16 SORNA."); *United States v. Hinckley*, 550 F.3d 926, 939 (10th Cir.
17 2008) (determining that the fact that Oklahoma had not statutorily
18 implemented SORNA did not provide an excuse for the defendant not to
19 register because the defendant had knowledge of his duty to register
20 under similar state and federal provisions); *United States v. Crum*,
21 2008 WL 4542408, at *2 (W.D. Wash. 2008) ("Washington's failure to
22 implement SORNA has no bearing on defendant's free-standing duty
23 under federal law to 'register, and keep the registration current, in
24 each jurisdiction where the offender resides, where the offender is
25 an employee, and where the offender is a student.'"); *United States*
26 *v. Benton*, 2008 WL 5273971, at *6 (S.D. Ohio 2008) (recognizing that

1 "courts addressing this issue have overwhelmingly held that SORNA is
2 effective and applicable prior to state implementation of SORNA
3 requirements"). These courts have recognized that SORNA creates a
4 federal duty to register and this federal duty to register is not
5 dependent on whether the state has implemented SORNA.

6 Defendant's federal duty to register is triggered because he
7 meets SORNA's statutory definition of "sex offender." *See Crum*, 2008
8 WL 4542408, at *2 ("While Washington may choose never to implement
9 the law, and thereby forego a portion of its federal funding, see 42
10 U.S.C. § 16925, an individual sex offender has no option to flout his
11 federal obligation."). Contrary to Defendant's argument, Defendant's
12 federal duty to register existed independent of Washington's
13 implementation of SORNA.

14 **2. Commerce Clause**

15 Defendant next claims that the indictment must be dismissed
16 because SORNA exceeds the scope of Congress's power under the
17 Commerce Clause.

18 Defendant's Commerce Clause argument is foreclosed by Ninth
19 Circuit case law. The Ninth Circuit's holding in *United States v.*
20 *Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010), reaffirmed its prior
21 decision in *George* that SORNA's registration requirements do not
22 violate the Commerce Clause:

23 On September 29, 2010, this court held that the SORNA provisions
24 that the district court . . . declared invalid under the
25 Commerce Clause were legitimate exercises of Congress's commerce
26 power. *United States v. George*, 625 F.3d 1124, 1130 (9th Cir.
2010) (reasoning that SORNA's registration requirements "are
reasonably aimed at regulating persons or things in interstate
commerce and the use of the channels of interstate commerce."
(citation and quotation marks omitted)). That holding controls

1 here. We therefore hold that the district court erred in
2 dismissing Valverde's indictment on the ground that 42 U.S.C. §
3 16913 and 18 U.S.C. § 2250 were an invalid exercises of
4 congressional authority under the Commerce Clause.

5 Contrary to Defendant's assertion, SORNA is a valid exercise of
6 Congress's Commerce Clause authority. *See, also, United States v.*
7 *Cabrera-Gutierrez*, 718 F.3d 873, 877 (9th Cir. June 3, 2013) ("we see
8 no reason to depart from our previously expressed opinion and
9 reaffirm that Congress had the power under the Commerce Clause to
10 enact SORNA").

11 **3. Delegation of Legislative Authority**

12 Defendant lastly argues that SORNA is unconstitutional because
13 42 U.S.C. § 16913(d) violates the non-delegation doctrine by
14 delegating to the Attorney General the power to determine SORNA's
15 retroactivity.

16 Under the non-delegation doctrine, Congress "is not permitted to
17 abdicate or transfer to others the legislative functions with which
18 it is [constitutionally] vested." *Panama Ref. Co. v. Ryan*, 293 U.S.
19 388, 421 (1935). The non-delegation doctrine does not keep Congress
20 from obtaining the assistance of its coordinate branches; it merely
21 requires Congress to provide clear guidance and delineate the
22 boundaries of delegated authority. *Mistretta v. United States*, 488
23 U.S. 361, 372-373 (1989).

24 42 U.S.C. § 16913(d) provides:

25 The Attorney General shall have the authority to specify the
26 applicability of the requirements of this subchapter to sex
offenders convicted before July 27, 2006 or its implementation
in a particular jurisdiction, and to prescribe rules for the
registration of any such sex offenders and for other categories
of sex offenders who are unable to comply with subsection (b) of
this section.

1 When read in isolation, this provision may appear to grant the
2 Attorney General authority to determine SORNA's retroactivity.
3 However, when Section 16913 is read as a whole, it is apparent that
4 Section 16913(d) only authorizes the Attorney General to promulgate
5 regulations in a limited number of circumstances. *See United States*
6 *v. Elliott*, 2007 WL 4365599 (S.D. Fla. 2007) ("this Court does not
7 read SORNA as empowering the Attorney General to determine the
8 retroactive application of SORNA, *in toto*, but rather only permits
9 the Attorney General to issue regulations with respect to those
10 persons who are unable to comply with the "initial registration"
11 requirements of § 16913(b)"). A provision that may seem ambiguous in
12 isolation is often clarified by the remainder of the statutory
13 scheme. *Smith v. U.S.*, 508 U.S. 223, 233 (1993).

14 Section 16913(a) requires every sex offender, defined as "an
15 individual who **was** convicted of a sex offense," 42 U.S.C. § 16911(1)
16 (emphasis added), to register without regard to the date of their
17 conviction. The plain language of 42 U.S.C. § 16913(a) thus
18 indicates that SORNA is applicable to sex offenders convicted at any
19 time, before or after July 27, 2006. It is apparent that Congress
20 made SORNA retroactive. Even if the language of the statute was
21 deemed ambiguous, the conclusion that SORNA is applicable to sex
22 offenders convicted prior to the Act is supported by the purpose of
23 the Act: to establish a national registry of sex offenders for the
24 protection of the public. 42 U.S.C. § 16901. It was Congress's
25 desire to create a comprehensive and uniform registration system
26 among the states to ensure offenders could not evade requirements by

1 simply moving from one state to another. To construe Section 16913
2 as excluding all sex offenders convicted prior to July 27, 2006 would
3 defeat the express purpose of the Act.

4 Moreover, Congress delegated authority to the Attorney General
5 in 42 U.S.C. § 16913(d) only to promulgate regulations for the
6 registration of persons classified as sex offenders under SORNA who
7 were not previously required to register under the laws of their
8 state. See *United States v. Waybright*, 561 F. Supp. 2d 1154, 1170-
9 1171 (D. Mont. 2008); *United States v. Elliott*, 2007 WL 4365599 (S.D.
10 Fla. 2007) (Section 16913(d) only permits the Attorney General to
11 issue regulations with respect to those persons who are unable to
12 comply with the "initial registration" requirements of Section
13 16913(b)); *United States v. LeTourneau*, 2008 WL 112105, at *6 (S.D.
14 Tex. 2008) (the authority delegated under Section 16913(d) is
15 limited); *United States v. May*, 2007 WL 2790388, at *6 (S.D. Ia.
16 2007) (Section 16913(d) delegates a limited authority, and the
17 Attorney General has been granted merely an advisory role). In
18 enacting 42 U.S.C. § 16913(d), Congress merely authorized the
19 Attorney General to create gap-filling provisions to insure SORNA's
20 statutory purpose is effectuated when sex offenders fall outside the
21 purview of Section 16913(b). *United States v. Mason*, 510 F.Supp.2d
22 923, 928 (M.D. Fla. 2007). This reading of the limited authority
23 delegated in Section 16913(d) is also supported by the heading of
24 that section: "Initial registration of sex offenders unable to comply
25 with subsection (b) of this section."

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1 Because Section 16913(d) only grants the Attorney General
2 authority to promulgate regulations in limited circumstances,
3 Congress did not violate the non-delegation doctrine of the
4 Constitution by giving the Attorney General limited authority under
5 42 U.S.C. § 16913(d).

6 For the reasons discussed above, the Court denies Defendant's
7 motion to dismiss.

8 **III. CONCLUSION**

9 The Court being fully advised, **IT IS HEREBY ORDERED as follows:**

10 1. Defendant's Motion in Limine (**ECF No. 27**) is **GRANTED**; and

11 2. Defendant's Motion to Dismiss (**ECF No. 26**) is **DENIED**.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to counsel.

14 **DATED** this 5th day of August, 2013.

15
16 S/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge
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